SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 1147

FRANK G. RATH, INDIVIDUALLY AND AS PRESIDENT OF HOTEL AND RESTAURANT EMPLOYEES' INTERNATIONAL ALLIANCE, COOKS' LOCAL UNION NO. 167, ET AL.,

Petitioners,

vs.

PEARL E. CROSBY.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OHIO AND BRIEF IN SUPPORT THEREOF.

JOSEPH A. PADWAY,
HENRY KAISER,
JAMES A. GLENN,
MARTIN E. BLUM,
Counsel for Petitioners.

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FRANK G. RATH, INDIVIDUALLY AND AS PRESIDENT OF HOTEL AND RESTAURANT EMPLOYEES' INTERNATIONAL ALLIANCE, COOKS' LOCAL UNION NO. 167, ET AL.,

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vs.

PEARL E. CROSBY.

PETITION FOR WRIT OF CERTIORARI

To the Honorable The Justices of The Supreme Court of the United States:

Frank G. Rath, individually and as President of the Hotel & Restaurant Employees' International Alliance, Cooks' Local Union No. 167, et al., respectfully petition for a writ of certiorari to review a decision of the Supreme Court of Ohio, 139 Ohio State 151, rendered December 24, 1941, dismissing an appeal filed as of right from the decree of the Court of Appeals of Cuyahoga County, Ohio, and overruling motion for an order directing said Court of Appeals to certify its record.

A.

Summary Statement of Matter Involved

Frank G. Rath and the other petitioners are members and officers of the Joint Executive Board of the Hotel and Restaurant Employees' International Alliance, affiliated with the American Federation of Labor. This association is composed of members of Waiters' Union, Local No. 106, Waitresses' Union, Local No. 107, and Cooks' Union, Local No. 167, all of Cleveland, Ohio.

Pearl E. Crosby is the owner and operator of a restaurant in the City of Cleveland, Ohio (R. 28).

In August, 1937, two representatives of the petitioners called upon Mrs. Pearl E. Crosby in an effort to discuss with her the employment of members of the petitioners' labor union in her place of business. This she refused to do.

On October 4, 1937, the petitioners proceeded to patrol in front of employer's restaurant, carrying banners containing the following language:

> "Crosby's Restaurant unfair to organized labor. Please do not patronize. Cooks' and Waitresses' Union, affiliated with A. F. of L."

On October 11, 1937, a temporary consent decree was entered into, permitting two pickets in front and one in the rear of plaintiff's place of business.

On January 27, 1938, the Court of Common Pleas of Cuyahoga County heard the case on its merits and issued an injunction prohibiting picketing (R. 28). The case was heard *de novo* by the Ohio Court of Appeals, and the decree was reversed so as to permit peaceful picketing (R. 8). The Supreme Court of Ohio sustained a motion to certify filed by the appellee, Crosby, herein and by a majority opinion (136 Ohio St. 352) reversed the Court of Appeals

and sustained the Trial Court's decree, prohibiting picketing in any manner whatsoever.

Thereupon, your petitioners filed their petition for a writ of certiorari in the Supreme Court of the United States at the October Term, 1940, No. 187, which was denied February 10, 1941 (312 U. S. 690).

Thereafter, on July 21, 1941, three and one-half years after the events giving rise to said permanent injunction, your petitioners filed their motion in the Court of Appeals of Cuyahoga County, Ohio, to modify said injunction so as to permit peaceful picketing (R. 28), which motion was on September 15, 1941, overruled (R. 12). From the overruling of this motion your petitioners filed in the Supreme Court of Ohio their appeal as of right and motion for an order directing the Court of Appeals to certify its record (R. 3-4).

On December 24, 1941, the Supreme Court of Ohio overruled the motion for an order directing the Court of Appeals to certify its record and sustained the motion by appellee to dismiss the appeal filed as of right on the ground that no debatable constitutional question was involved in said case (R. 2).

B.

Statement as to Jurisdiction

Jurisdiction is invoked under Title 28, U. S. C. A. Section 344(b) (Judicial Code, Section 237 (b) as amended by the Act of February 13, 1925).

The judgment of the Supreme Court of Ohio was rendered December 24, 1941. Application for rehearing, timely filed, was denied January 14, 1942 (R. 2).

The activities which premised the permanent injunction occurred in 1937. The Court of Common Pleas issued its injunction, restraining all picketing, on January 27, 1938. On May 25, 1939, the Court of Appeals modified the injunction so as to permit peaceful picketing. Under this modifi-

cation, petitioners peacefully picketed for a period of one day, when a temporary injunction restraining all picketing was issued pending appeal in the Supreme Court of Ohio (R. 31). Thus, except for a period of one day, there had been no picketing whatever of respondent's restaurant for a period of about three and one-half years, when, on July 21, 1941, your petitioners filed their motion to modify.

The injunction we sought to modify denies petitioners rights under the Fourteenth Amendment to the Federal Constitution. It enjoined

> "* * * picketing, bannering, or patrolling the streets or sidewalks adjacent to or in the vicinity of the plaintiff's place of business;"

your petitioners are further permanently enjoined

> "From inducing, or attempting to induce, any customer, prospective customer, or any person, firm or corporation with whom plaintiff deals, not to deal with plaintiff; and from making, publishing, distributing, or displaying any statement, oral, written, printed, painted, or otherwise, or from doing any other act or thing, with the intent, purpose or effect of injuring the plaintiff's business, and from threatening to do so." (R. 10).

The restraint of the above quoted paragraph is not limited to the vicinity of the respondent's place of business but is universal. That the injunction has been fully complied with is undisputed.

When the motion was filed on July 21, 1941, it was asserted as a fact that "any past acts of force, threats or intimidation alleged to have been conducted or made by defendants-appellants in the course of the picketing of said Pearl E. Crosby's restaurant have, by the passage of time and circumstance, lost any coercive influence or effect which may be averred to have arisen therefrom, * * *".

The federal question was expressly raised before the Court of Appeals on the motion to modify. The motion set forth the rights of petitioners, "as citizens of the United States", to freedom of speech and press as granted by Section 1 of the Fourteenth Amendment to the Constitution of the United States (R. 30-31).

Similarly, the federal question was expressly raised, by assignment of error, in the Supreme Court of Ohio. The Supreme Court of Ohio ruled on the federal question, holding that "no debatable constitutional question was involved".

Thus the Ohio courts, by rendering their decisions herein in conflict with the decisions of this Honorable Court in the cases of *American Federation of Labor* v. *Swing,* 61 S. Ct. 568, and *Milk Wagon Drivers' Union, et al.* v. *Meadowmoor Dairies, Inc.,* 61 S. Ct. 552, have denied your petitioners rights and privileges guaranteed to them by the Constitution of the United States.

The following cases are believed to sustain jurisdiction: *Milk Wagon Drivers' Union, et al.* v. *Meadowmoor Dairies, Inc., supra; American Federation of Labor* v. *Swing, supra; Van Huffel* v. *Harkelrode,* 284 U. S. 225; *United States* v. *Swift & Co.,* 286 U. S. 106, 76 L. Ed. 999, 52 S. Ct. 460; *Thornhill* v. *Alabama,* 310 U. S. 88, 60 S. Ct. 736; *Carlson* v. *California,* 310 U. S. 106; *Journeyman Tailors Union, Local No. 195, Amalgamated Clothing Workers of America, et al.* v. *Miller's, Inc.,* 61 S. Ct. 732; *Lovell* v. *Griffin,* 303 U. S. 444; *Schneider* v. *State,* 308 U. S. 147; *Cantwell* v. *Connecticut,* 310 U. S. 296.

C

The Question Presented.

Does the decree of the Supreme Court of Ohio, sustaining the decree of the Court of Appeals of Cuyahoga County, Ohio, overruling your petitioners' motion to modify the

permanent injunction so as to permit peaceful picketing, abridge the right of freedom of speech and of the press guaranteed by the Fourteenth Amendment to the Constitution of the United States?

D

The Reasons Relied on for the Allowance of the Writ

The grounds relied on by the petitioners for the allowance of the writ are:

1. The decision of the Supreme Court of Ohio determined a federal question of substance in a manner directly at variance with the following decisions of this Honorable Court: *Milk Wagon Drivers Union, et al.* v. *Meadowmoor Dairies, Inc., supra; American Federation of Labor* v. *Swing, supra; Thornhill* v. *Alabama, supra; Carlson* v. *California, supra; Journeymen Tailors Union, Local No. 195, Amalgamated Clothing Workers of America, et al.,* v. *Miller's, Inc., supra; Senn* v. *Tile Layers' Protective Association,* 301 U. S. 468; *Bakery & Pastry Drivers & Helpers Local 802 of the International Brotherhood of Teamsters, et al.,* v. *Hyman Wohl and Louis Platzman,* decided March 30, 1942; *Carpenters & Joiners Union of America, Local No. 213, et al.* v. *Ritter's Cafe, et al.,* decided March 30, 1942.

2. Despite the fact that the record in the original case, resulting in the permanent injunction, indicated acts of violence prior to the issuance of the permanent injunction, nevertheless, when the motion to modify was filed, there had been a lapse of approximately three and one-half years—with the exception of one day of peaceful picketing—since there had been any picketing whatever of respondent's restaurant. During the passage of time, the past violence "lost any coercive influence or effect" which

may have arisen therefrom. Thus, this case is clearly within the *Meadowmoor* case, wherein this Honorable Court stated as follows:

> "Inasmuch as the injunction was based on findings made in 1937, this decision is no bar to resort to the state court for a modification of the terms of the injunction should that court find that the passage of time has deprived the picketing of its coercive influence."
>
> * * * * * * *
>
> "The injunction which we sustain is 'permanent' only for the temporary period for which it may last. It is justified only by the violence that induced it and only so long as it counteracts a continuing intimidation. Familiar equity procedure assures opportunity for modifying or vacating an injunction when its continuance is no longer warranted. Here again, the state courts have not the last say. They must act in subordination to the duty of this court to enforce constitutional liberties even when denied through spurious findings of fact in a state court. Compare *Chambers* v. *Florida,* 309 U. S. 227. Since the union did not urge that the coercive effect had disappeared either before us or, apparently, before the state court, that question is not now here."

This is the first attempt of a labor union to seek protection by this Honorable Court of its constitutional right to communicate its grievances in accordance with the *Meadowmoor* decision. We respectfully urge that, unless certiorari be granted to review and set aside the judgment of the Supreme Court of Ohio, then the courts of that state and others may be encouraged to assign to the *Meadowmoor* decision a meaning and interpretation contrary to the express language of this Honorable Court, with the result that basic liberties of working people will be lost.

Prayer for Writ

Wherefore your petitioners pray that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the Clerk of the Supreme Court of Ohio, commanding that court to certify and send to this Court for review and determination, on a day certain to be therein named, a full and complete transcript of the record and all proceedings in the case numbered and entitled No. 28861, Crosby, Plaintiff-Appellee, v. Rath et al., Defendants-Appellants, and that the decree of the Supreme Court of Ohio may be reviewed by this Honorable Court and that your petitioners may have such other and further relief in the premises as to this Honorable Court may seem meet and just; and your petitioners will ever pray.

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